Supreme Court, U. S.
FILED
JUL 3 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____TERM, 1979

NO. 79-13

ANTOINETTE FOSTER, Appellant

v.

COUNTY SCHOOL BOARD OF PRINCE WILLIAM COUNTY

Appellee

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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July 3, 1979

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McInnis v. Oglivie,
384 US 322 (1969)
Mills v. Bd of Education,
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93 Idaho 469, 463 P. 2d 935 (1970)

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OTHER AUTHORITIES

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No. 4 (June 11, 1971).
Wilson, "Social Class & Equal Educational
Opportunity", Harvard Educational Review XXXVIII (1968):7.
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McKay, "Political Thickets & Crazy Quilts:
Reapportionment & Equal Protection,"
Michigan Law Review, LXI (963), 671.
68 AmJur 2d Schools & School Districts
Par 6, p 364.

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ANTOINETTE FOSTER, Appellant

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Appellee

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ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

_____

JURISDICTIONAL STATEMENT

Antoinette Foster, the appellant, appeals from the final judgment of the Supreme Court of Virginia, dated April 6, 1979, holding that there is a reversible error in the judgment, with a failure to recognize that there is both a state and a federal validity of the concept of a free public education.

OPINIONS BELOW

The April 6, 1979 decision of the Supreme Court of Virginia, which appears in the appendix hereto, p. 1a infra, is not reported in the Virginia Reports.

JURISDICTION

The judgment of the Supreme Court of Virginia, denying free textbooks to all public school children in the state of Virginia, was entered on April 6, 1978. See p. 1a, infra. There was no motion for rehearing. A supplementary notice of appeal to this Court was duly filed in the Supreme Court of Virginia on June 26, 1979. See p. 1a, infra.

This appeal is being docketed in this Court within 90 days from the denial of the petition for appeal. The jurisdiction of the Supreme Court to hear this appeal rests upon 28.U.S.C. par. 1257(2).

QUESTIONS PRESENTED

Whether the refusal to recognize that textbooks are an integral, fundamental part of the education process was violative of historical fact.

Whether the refusal to recognize the internal contradictions in Article VIII, Section 3 of the Virginia Constitution which (1) accords unequal treatment to children because of disparate wealth in regard to textbooks and which (2) errs in its definition of the word "free" (which does NOT mean "open only to those who can NOT afford") is violative of basic human rights by attempting to distinguish between various levels of poor; i.e.---how Poor is Poor?

Whether the refusal to find a reversible error in the Virginia Constitution was contradictory to the statement in the Virginia Constitution (and in ALL State Constitutions and General Statutes except Mississippi) that education is Free and Compul-

sory. If education is compulsory, must it not, also, be free?

Whether the refusal to find a reversible error in the Virginia Constitution was violative of the United States Constitutional validity of the concept of a free public education.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

. . . education is "inextricably linked to the right to participate in the electoral process and the rights of free speech and free association guaranteed by the First Amendment." (San Antonio Independent School District v. Rodriguez, 411 US 1 (1973).

Fourteenth Amendment, United States Constitution:

. . .the rationality test of the Fourteenth Amendment, i.e. that the state must "accord the same treatment to persons placed by a statute into different classes on the

basis of criteria wholly unrelated to the objective of that statute" . . .

The Constitution of Virginia, Article VIII, Section 1 . . .shall provide for a system of free public education . . .for all children . . .

Section 3 . . . shall provide by law for the compulsory education of every child . . . it shall insure that textbooks are provided at no cost to each child whose parent or guardian is financially unable to furnish them" . . .

RAISING THE FEDERAL QUESTION

Both in the Circuit Court of Prince William County, Virginia and in the Supreme Court of Virginia, the appellant raised the claim that the Virginia Constitution, Article VIII, Section 3 was unconstitutional since it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This was contrary to the rationality test enunciated in Brown and Rodriguez. The federal question

was raised in the Assignments of Error and again at the oral hearing before the Supreme Court of Virginia. On neither occasion did the Supreme Court of Virginia respond or refer to the federal questions that were raised. Thus, by implication, the Supreme Court of Virginia considered and expressly rejected this federal constitutional claim.

STATEMENT OF THE CASE

On September 9, 1977, defendant's child, an eighth grader, entered the Prince William County School System and was given a bill for textbook rental. Defendant acknowledged that her child used the textbooks, that she is not an indigent and is financially able to pay the fee. However, she claims that she is not liable because she believes that the right to free textbooks transcends the concept of poor vs not-so-poor. Appellant claims, further, that the right to a free public education includes the use of free textbooks since textbooks are an integral

part of the education process. Appellant believes further, that the compulsoriness of public education, i.e., the obligation by law to attend school, places the burden of responsibility on the state to provide for the basics in education: the building, teachers, and the textbook.

Appellant claims further that the Constitution of the State of Virginia violates the Equal Protection clause of the Fourteenth Amendment by failing to meet its rationality test and that Equal Educational Opportunity is denied under this statute by according unequal treatment to children because of disparate wealth.

Appellant claims further, that there exists a United States Constitutional validity of the concept of a free public education.

THE QUESTIONS ARE SUBSTANTIAL

The belief that equal educational opportunity includes free textbooks is a historical fact. For almost a century this concept has been tacitly accepted by the courts, with judicial analysis focusing on the type of facilities that went into a school. The state's duty to provide equal educational opportunity was deemed satisfied only if it provided the same calibre of facilities, i.e. "texts; equipment, teachers". . . (Plessy v. Ferguson 163 US 37 1896).

A free education includes free textbooks since "textbooks are necessarily elements of any school's activity, and as such are indistinguishable from other fixed educational expense items such as school building maintenance and teachers' salaries" (Paulson v. Minidoka County School District 93 Idaho 469,, 463 P.2d 935 (1970); "no fees may be charged for books since they are an integral, fundamental part of the elementary and secondary

education". (Bond v. Ann Arbor School District 383 Mich 693, 178 NW 2d 484 (1970); "no fee may be charged for textbooks based on the "necessity" argument for if an exception were recognized on the grounds of necessity, the necessity would always be found to exist". (Brewer v. Ray 149 Ga 596, 101 SE 667 (1919)"no fees may be charged for any part of the regular public school curriculum" (Wyo. Atty General, 1971 Opin No 4 Jun 11, 1971).

Most of the states which provide free textbooks have unambiguous statutory mandates for this provision. Therefore, since free textbooks have never been an issue, these states have never felt it necessary to seek a judicial ruling on the subject.

The Constitution of Virginia, Article VIII Section 1 states that "the General Assembly shall provide for a system of free public...schools for all children of school age.. Section 3 states that "the General Assembly shall provide by law for the compulsory education of every child". . ."and that textbooks are provided free (but only) "to each child whose parent is unable to afford them".

There are obvious internal contradictions in these statements. "Free" by definition means "open to all". The word "free" cannot be modified or qualified to suit the whims of the Virginia lawmakers.

"Afford" is ambiguous. Is it to be tested by a mere declaration? by some indigency test? more broadly, by an inability to take advantage of a public good or service? And how do we decide and who does the deciding on the issue of "How Poor is Poor"? Some are poor who earn $5000 per annum; others are poor who earn twice that amount. And there are many who are too poor to pay, yet suffer the burden of paying rather than to be exposed to public ridicule in the courts.

Since all children are required by law to go to school (except in Mississippi), the states, in turn, are required by law to

provide children with a free public education. Therefore, the word "compulsory" implies "free".

Because the Virginia textbook rental system fails to meet the rationality test of the Fourteenth Amendment, it is in violation of the Equal Protection clause of that amendment. The Equal Protection clause prevents states from arbitrarily treating people differently under their laws. (Harper v. Virginia Board of Elections 383 US 663, 670 (1966). Statutes have been overturned if they classify "in a way which appears rational, but which nonetheless prove on closer examination to include within a single classification some members not like others in the same group or fail to include some that are like those in the group selected for favored or disfavored treatment. (McKay, "Political Thickets and Crazy Quilts; Reapportionment and Equal Protection," Michigan Law Review, LXI (1963), 671.

By according different treatment to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute, the Virginia Constitution is violating the rationality test of the Fourteenth Amendment. For the purpose of the Virginia lawmakers as stated in their Constitution is to provide a compulsory education; not to group children into fiscal categories in order that textbooks shall or shall not be provided.

All children in this country, including those living in the Commonwealth of Virginia, have both a right and an obligation to attend school. (Brown v. Board of Education 347 US 483 (1954) enforces this belief: "Today education is perhaps the most important function of state and local government . . .it is doubtful that any child may reasonably be expected to succeed in life if he be denied the oppor-

tunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all children" . . .

And the four dissenting voices in Rodriguez took direct issue with the argument that education is not a fundamental, Constitutional recognized interest, claiming instead that education is "inextricably linked to the right to participate in the electoral process and the rights of free speech and free association guaranteed by the First Amendment".

Justices White, Brennan, Marshall, and Douglas asserted that . . . "regardless of whether a fundamental right to education exists, there are rights in education once the state has undertaken to provide them, which, under Brown, must be made available to all on equal terms" . . .They further argued that "any classification affecting education must be subjected to strict judicial scrutiny." (Id 1312-1339).

CONCLUSION

It is true that education is not mentioned in the Constitution nor in any of the amendments to it. The founding fathers, in their attempt to adjust the differing ideologies entangled in the colonial heritages and in American sectionalism, simply relegated education to the individual states, with public education residing as a function of the state and local governments. Thus "the legislature of each state is required by constitutional provisions to provide a school system whereby all children may receive an education. The legislature is required also, to provide a general and uniform system of common schools, where tuition shall be without charge and equally open to all." (68 AmJur 2d Par 6 P 364).

Every state has included provisions for free public education in its constitution and general statutes. (U.S. Commiss. on Civil Rights, Racial Isolation in the Public Schools

(Washington, D.C., U.S. Govt Printing Office, 1967, Chap 3).

Representative cases include People ex rel Nelson v. Jackson Highland Building Corp 400 Ill. 533 81 NE 2d 528 (1948); Malone v. Hayden 329 Pa. 213, 197 Atl. 344 (1938); Grant v. Nichols 94 Mont 452 23 P2d 266 (1933); Piper v. Big Pine School Dist 193 Cal 664 226 Pac 926 (1924).

The Commonwealth of Virginia, therefore, does not have the right to arbitrarily deny this free public education to a particular class of people, especially in view of the fact that the United States Supreme Court itself, continues to display judicial modesty in assessing in areas of disparate wealth. (Rodriguez; McInnis v. Oglivie 334 US 322 (1969).

Wherefore, it is prayed that the judgment of the Supreme Court of Virginia be reversed and that the United States Supreme Court make a judicial redefinition of Equal

Educational Opportunity; that the United States Supreme Court reformulate Article VIII, Section 3 of the Virginia State Constitution, omitting that portion of the text which accords different treatment to children in public schools based on disparate wealth, and that the United States Supreme Court make textbooks free not just to the indigent, but to all children without qualification or modification.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

DR. ANTOINETTE FOSTER
P. O. Box 1416
Manassas, Virginia
Appellant

Antoinette Foster
pro se

RALPH COON, Esquire
COUNSEL FOR COUNTY SCHOOL
BOARD OF PRINCE WILLIAM
COUNTY
Appellee

July 3, 1979

Proof of Service---Affidavit

I, Antoinette Foster, pro se, appellant herein, depose and say that on the 3rd day of July 1979, I served a copy of the foregoing Jurisdictional Statement to the United States Supreme Court on County School Board of Prince William County, appellee herein, by hand-delivering the same to the offices of Ralph Coon, Esquire, counsel of record for said County School Board, located at 9100-A Center Street, Manassas, Virginia.

The County School Board of Prince William County is the only party required to be served.

Antoinette Foster

Antoinette Foster, PhD, LLB

Subscribed and sworn to before me at Manassas, Virginia this 3rd day of July, 1979.

James L. Niccolls

OFFICIAL SEAL
JAMES L. NICCOLLS
NOTARY PUBLIC VIRGINIA
STATE-AT-LARGE
My Commission Expires Feb 17, 1981

APPENDIX

(a) There were no opinions delivered upon the rendering of the Supreme Court of Virginia's decree.

(b) Earlier opinion in the same case: Circuit Court Order dated October 10, 1978; motion denied.

(c) Copy of judgment, Virginia Supreme Court:

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on

Friday the 6th day of April 1979

Antoinette M. Foster, Appellant

against Record No. 790029
Circuit Court No. L-9299

County School Board of Prince William County, Appellee,

From the Circuit Court of Prince William County

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy,
Clerk

Supreme Court, U. S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

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OCTOBER TERM, 1979

No. 79-13

ANTOINETTE FOSTER, Appellant,

V.

COUNTY SCHOOL BOARD
of
PRINCE WILLIAM COUNTY

Appellee,

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

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July 24, 1979

Counsel for Appellee

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McGowan v. Maryland, 366 U.S. 420, 425-26, 6 L.Ed. 2d 393; 81 S.Ct. 1101 (1961). . 7,8

Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508; 95 S.Ct. 1881 (1975). 11

San Antonio School District v. Rodriguez, 411 U.S. 35, 36, 40, L.Ed. 2d 16, 44; 93 S.Ct. 1278 (1973). 5,6,7,9

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Appellee,

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Virginia on the ground that it does not present a

substantial federal question or in the alternative that the judgment herein rests on an adequate non-federal basis.

I.

THE STATE CONSTITUTION AND STATUTES INVOLVED AND THE NATURE OF THE CASE.

A. Constitution and Statutes

Section 1, Article VIII, Constitution of Virginia provides that the General Assembly shall provide a system of free public elementary and secondary schools for all children of school age of the Commonwealth; and Section 3 directs that the legislature shall ensure that textbooks are provided at no cost to each child attending public school whose parent is financially unable to furnish them.

Sections 22-295 through 22-318.1, Code of Virginia, set forth the scheme of procurement of textbooks, and Section 22-307.1, Code of Virginia,

authorizes and encourages each School Board to establish a textbook rental system.

B. The Proceedings Below

The stipulated facts offered in the Circuit Court of Prince William County, Virginia established that the Appellee has a child who attended and used textbooks in the Appellant's school system for the year 1977-78: that the Appellant has, in accordance with the law, established a textbook rental system; that Appellee was responsible for and financially able to pay the textbook rental fee but refused to pay same claiming that the rental system was unconstitutional in that it violated her rights and those of her son to have a free public education. The Circuit Court awarded judgment to Appellee against Appellant for the

textbook rental fee. Finding no reversible error, the Supreme Court of Virginia refused the petition for writ of error, 219 Va. _____, April 6, 1979 (no opinion).

II.

ARGUMENT

The Case Presents No Substantial Federal Question Not Previously Decided By This Court

Prior to and in Brown v. Board of Education, 347 U.S. 483, 98, L.Ed. 873, 74 S.Ct.686 (1954), this Court recognized the importance of education in our Democratic Society, and ruled that when a state undertakes to provide education, it must be made available to all on equal terms. But there was no requirement in that case, or in any subsequent case, that all facets of education must be provided completely free of charge.

The Court reaffirmed its position that there is not a constitutional right to a free public education in San Antonio School District v. Rodriguez, 411 U.S. 1, 35, 36 L.Ed. 2d 16, 44; 93 S.Ct. 1278 (1973) wherein it said:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.

In that case, at 411 L.Ed. 2d 41, the Court cited many authorities for the theme of a respect for education in a free society, but in none is there a holding that the United States Constitution requires or provides for the requirement of a free public education to be provided by either the Federal, State or Local Governments.

Thus, it is crystal clear that there is no constitutional requirement for a free public education. Counsel would submit that if there is no requirement for the education itself, there can be no requirement for the materials used therein, i.e., textbooks and materials.

The Appellant also asserts that the Virginia textbook rental system is in violation of the Equal Protection Clause of the Fourteenth Amendment, which guarantees that all people similarly situated will be treated alike by the State.

This argument constitutes "nothing less than a direct attack on the way in which [the Commonwealth of Virginia and Appellee have] chosen to . . . disburse state and local tax revenues." San Antonio School District v. Rodriquez, 411 U.S. 1, 40 (1973)

The legislation at issue here falls squarely within the social and economic areas of concern left to the states to address and resolve. Accordingly, the traditional standard of review must be applied in analyzing the Appellant's equal protection claim. See Rodriquez, supra; Dandridge v. Williams 397 U.S. 471 25 L.Ed. 2d 491, 90 S.Ct. 1153 (1970). That standard was succinctly set forth by this Court in McGowan v. Maryland, 366 U.S. 420, 425-26 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961):

> Although no precise formulas have been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that,

> in practice their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

It cannot be disputed that the State and her localities possess only a finite amount of financial resources to allocate among the many and varied worthwhile and necessary services they provide to the citizens of this Commonwealth. The problems inherent in providing these services are legion and, most appropriately, must be resolved by our elected officials, Maher v. Roe, 432 U.S. 464, 53 L.Ed. 2d 484, 97, S.Ct. 2376 (1977). Education is just one of the services competing for these limited resources. The providing of education itself gives rise to a multitude of problems and questions which must be addressed and resolved by our State and Local legislative

bodies. As stated by the Court in Rodriguez, supra, at 42:

> Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' Dandridge v. Williams, 397 U.S. at 487. The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect. Jefferson v. Hackney, 406 U.S., at 546-47.

The Commonwealth of Virginia and Prince William County "has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program." Shapiro v. Thompson 394 U.S. 618, 633 22 L.Ed. 2d 600, 89 S.Ct. 1322 (1969)

Finally the Appellee points to one Section of the Virginia Constitution, Section 1, Article VIII, which directs that the legislature shall provide for a system of free public schools, which she asserts includes furnishing textbooks at no expense.

This same argument was made before the trial court and in the petition for writ of error to the Supreme Court of Virginia. Both courts rejected the argument.

One basis for their rejection must have been the fact that Section 1 of Article VIII must be read in conjunction with Section 3 of Article VIII, which requires free textbooks to be furnished only to a student "whose parent or guardian is financially unable to furnish them." (emphasis added)

Thus, the Virginia Constitution itself resolves the question the Appellant has raised. The Virginia Supreme Court is the ultimate expositor of Virginia law and this Court is bound by their construction except in extreme circumstances which are not present here. Cf. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975). This Court should not undertake to "reformulate Article VIII, Section 3 of the Virginia State Constitution," as Appellant prays for on page 19 of her jurisdictional statement, as this would violate the long-established rules of this Court.

Based upon the foregoing, Counsel submits, it is crystal clear that there is no new substantial federal question involved in the appeal. As this Court has ruled on numerous occasions, the

issues involved are to be left to the individual State to resolve. The appeal should be dismissed.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends has been previously decided by this Court, and is so unsubstantial as not to need further argument. Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the Supreme Court of Virginia.

Respectfully submitted,

E. Ralph Coon, Jr.

Craig D. Johnston
Craig D. Johnston
Counsel for Appellee

PROOF OF SERVICE

I hereby certify that three copies of the foregoing Motion to Dismiss or Affirm were mailed, postage prepaid, to Antoinette Foster, Appellant, pro se, P. O. Box 1416, Manassas, Virginia, this 24 day of July, 1979.

E. Ralph Coon, Jr.

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